BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LEIGH A. CONWAY	)	
Claimant	)	
VS.	)	
	)	Docket No. 5,009,161
FRITO LAY, INC.	)	
Respondent	)	
AND	)	
	)	
FIDELITY & GUARANTY INSURANCE	)	
Insurance Carrier	)	

ORDER

Respondent appeals the June 6, 2005 Award of Administrative Law Judge Brad E. Avery. The Workers Compensation Board (Board) heard oral argument on October 4, 2005.

APPEARANCES

Claimant appeared by her attorney, Roger D. Fincher of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, James C. Wright of Topeka, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ).

At oral argument, the parties agreed that through September 12, 2003, claimant's base average weekly wage was $588.30. Effective September 13, 2003, claimant's fringe benefits were discontinued. These fringe benefits total $117.75. Adding this $117.75 to the base wage increases her average weekly wage to $706.05 as of September 13, 2003.

ISSUES

1. Did the Division of Workers Compensation have jurisdiction to enter the December 18, 2003 settlement award?

2. What is the nature and extent of claimant's injury? And more particularly, is claimant entitled to work disability?

3. Did claimant exercise good faith in her post-injury job search?

4. Does equitable estoppel apply in this case?

5. Did claimant have "bumping" rights under the union contract?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds as follows:

Claimant, an employee of respondent for approximately seven years, began developing low left-sided pain in her back while lifting and bending on August 12, 2002. Claimant received medical treatment from various sources provided by respondent, but the record is limited with regard to much of the initial treatment provided to claimant. Claimant ultimately came under the care of Joseph G. Sankoorikal, M.D., board certified in physical medicine and rehabilitation. This examination and treatment by Dr. Sankoorikal did not occur until after claimant had reached the end of a 90-day grace period, during which time she was on light duty at the instruction of one of her earlier treating physicians. This light-duty period ended approximately March 13, 2003. At that time, claimant applied for and began receiving short-term disability which lasted six months, through September 13, 2003.

Claimant was first examined by Dr. Sankoorikal on April 23, 2003, after being seen by Dr. Mead and Dr. Florin O. Nicolae, and undergoing a MRI scan of the lumbar spine. Dr. Nicolae had earlier performed an epidural injection and a sacroiliac injection, which provided little or no improvement. Dr. Sankoorikal diagnosed degenerative disc disease and a bulging disc at L4-5, with radiculopathy to the left side; and sacroiliac dysfunction. Dr. Sankoorikal recommended conservative treatment utilizing Ibuprofen, a sacroiliac belt and a potential electromyographic study to rule out radiculopathy if claimant's symptoms persisted.

Claimant returned to Dr. Sankoorikal on May 20, 2003, with low back pain radiating into her left lower extremity and hip pain. Claimant had, by this time, undergone the electromyography recommended by Dr. Sankoorikal, which presented normal distal latencies from both tibial and peroneal nerves. Additionally, the sural nerve distal latency was normal. The electromyographic changes occurred mostly in the L5 myotomes. Dr. Sankoorikal diagnosed L5 radiculopathy on the left side, with degenerative disc disease and disc bulging at L4-L5. At this point, Dr. Sankoorikal recommended an epidural injection. Claimant underwent the epidural steroid injection under the hand of Dr. Nicolae

on June 18, 2003. Dr. Nicolae's notes indicated that an earlier lumbar epidural steroid injection on February 28, 2003, helped claimant with her pain for approximately one month, but then the pain returned.

Dr. Sankoorikal saw claimant in follow-up examination on July 8, 2003, at which time claimant indicated that her most recent injection had provided no benefit and had actually made the symptoms worse. Dr. Sankoorikal recommended a functional capacity evaluation (FCE) in order to determine claimant's ability to return to gainful employment. Claimant, as noted above, last worked for respondent on March 13, 2003. Claimant continued with her treatment with Dr. Sankoorikal and, on November 6, 2003, presented with low back pain and pain in the left foot. Dr. Sankoorikal provided claimant with specific restrictions, recommending medium-type work, with lifting limitations of 35 to 50 pounds, but recommended claimant stay closer to the 35-pound limit. He had earlier rated claimant at 10 percent to the body as a whole based upon the fourth edition of the AMA *Guides*.[1] He was provided a task list prepared by vocational expert Dick Santner. After reviewing the task list, Dr. Sankoorikal determined that claimant was unable to perform twelve of the twenty-two tasks on the list, for a 55 percent task loss.

Claimant was referred by her attorney to Daniel D. Zimmerman, M.D., board eligible in internal medicine. Dr. Zimmerman examined claimant on April 15, 2004, and identified claimant as having lumbosacral disc disease at L4-5. Dr. Zimmerman assessed claimant a 12 percent impairment to the body as a whole based upon the fourth edition of the AMA *Guides*.[2] Dr. Zimmerman was also presented the task list prepared by Mr. Santner, determining claimant was restricted from performing fourteen of the twenty-two tasks, for a 64 percent task loss. Dr. Zimmerman examined claimant on only one occasion. He was not provided the report of the EMG that was performed by Dr. Sankoorikal, but did have the opportunity to read the MRI report, although not the actual films. His recommendation for future treatment included hot tub baths, hot showers, heating pads and over-the-counter medications.

Claimant continued on short-term disability until September 13, 2003, at which time the short-term policy benefits terminated. Claimant was contacted by Danny Sheern, respondent's safety business unit leader. Mr. Sheern's responsibility included workers compensation claims, filling out paperwork, doing investigations and corresponding with the workers compensation insurance companies. He also discussed at length in his deposition the respondent's bid process. He had conversations with claimant regarding the best suitable job for her, considering the restrictions. They determined that a quality control technician (QCT) job would be within claimant's restrictions and would be the best job for her. On September 30, 2003, a QCT job came open on second shift. Claimant,

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[2] AMA *Guides* (4th ed.).

while being aware of the job, determined that she would not bid on it as it was a second-shift job which conflicted with her husband's job. As claimant had a 14-year old and a 5-year old living at home, she determined that it would be inappropriate for both her and her husband to work the same shift, leaving the 14-year old and the 5-year old at home alone. The 14-year old, who is claimant's youngest child, and the 5-year old, who is claimant's grandchild over which claimant has custody and guardianship, are the responsibility of claimant and her husband. Claimant's concern was that the 14-year old would be too young to care for the 5-year old.

Claimant determined the only way to work things out was to remain on third shift. Claimant testified that the bid sheet, which is posted on Tuesdays and left up for 72 hours, was checked every week by either her or a member of her family. Both claimant's husband and her mother were employed with respondent.

On December 16, 2003, another QCT job came open on first shift. This job was one claimant was apparently never apprised of and did not see on the bid board. Neither claimant's husband nor her mother advised her of the open position. The person who was awarded that job had less seniority than claimant. Mr. Sheern testified that if claimant had bid on that first shift job, she would have been awarded the position based upon seniority.

There was also a palletizing job which came open on third shift which claimant did bid on. However, claimant did not have sufficient seniority to be awarded that position.

Claimant was contacted by Mr. Sheern at some time in 2003 regarding the possibility of settling her workers compensation claim. Claimant was unsure of the exact timing of this contact, but estimated it was in November or December 2003. Claimant testified she was not aware that she was eligible for a settlement. Mr. Sheern advised her that it is something that was owed to claimant because of her injury.

Claimant contacted Mr. Sheern and asked whether the settlement would affect her short-term disability, and Mr. Sheern assured her that it would have no effect on her short-term disability. Claimant had also applied for long-term disability and, according to her testimony, was lead to believe that she could be paid long-term disability, keep her job and accept the workers compensation settlement. Mr. Sheern also testified that claimant had asked him about both short-term and long-term disability benefits and whether the workers compensation settlement would affect those benefits. He advised claimant that he did not believe the workers compensation settlement would affect her disability benefits. He acknowledged in his testimony that prior to the settlement, he had no idea that there would be a conflict. He was not the person in charge of dealing with short- and long-term disability benefits and apparently he did not refer claimant to the person or persons who would possess that information.

Claimant then determined that she would proceed with the settlement, which occurred on December 18, 2003. Claimant appeared at the settlement hearing voluntarily, but she was not represented by counsel. At that time, claimant settled her claim against respondent at a settlement hearing held before a special administrative law judge. As part of that settlement, the parties agreed that "[f]uture medical expense and **review and modification** issues are left open. All other issues, including nature and extent of disability and the right to vocational rehabilitation benefits[,] are closed."[3] The compromise was for a lump sum of $15,825.85 based upon a 10 percent impairment to the body as a whole pursuant to the rating of Dr. Sankoorikal. It does not appear from the transcript of the settlement hearing,[4] that there was any discussion with claimant regarding permanent partial general disability benefits (work disability benefits) from her August 12, 2002 accident. The settlement worksheet, which is attached to the transcript, discusses the 10 percent impairment rating of Dr. Sankoorikal and closes out all issues, including the nature and extent of disability. However, respondent's attorney, when discussing the terms of the settlement at that hearing, stated that the settlement covered,

> . . . any and all injuries or accidents Ms. Conway may have sustained at any time or place working for Frito Lay. Among the issues that are compromised are the nature and extent of her impairment, **disability**, and any right to vocational rehabilitation. (Emphasis added.)[5]

The Special ALJ conducting the hearing asked claimant if she understood the terms of the settlement and advised her that this was a strict compromise of the discussed issues. However, there is no finding by the Special ALJ in this record that this settlement was in claimant's best interest and there was no questioning by either respondent's attorney or the Special ALJ regarding claimant's work status at the time of the settlement hearing.

After the settlement, claimant was advised that the workers compensation settlement did, indeed, adversely affect her long-term disability payments and claimant lost the long-term disability benefits. At that point, claimant contacted an attorney. Claimant's attorney then filed a form K-WC E-5 Application for Review and Modification on January 29, 2004.

It was later determined that the settlement amount resulted in an underpayment of $451.28, as the adjuster who had computed the settlement had done so incorrectly.

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[3] R.H. Trans., Resp. Ex. B (Worksheet For Settlement regarding settlement hearing of December 18, 2003).

[4] R.H. Trans., Resp. Ex. A.

[5] R.H. Trans., Resp. Ex. A (Settlement Hearing Trans. at 3).

Neither respondent's attorney nor the Special ALJ discovered the error. However, upon discovery of the error, the underpayment was rectified and appropriate sums submitted to claimant through her attorney.

The record is extremely vague regarding claimant's ongoing job search after March 13, 2003. Claimant testified that she had hoped to return to work with respondent and continued to check the bid board, although it is obvious from this record claimant's efforts at checking the bid board were less than adequate, as her failure to discover the QCT job on December 16, 2003, apparently cost her the right to bid on and obtain that position with respondent. The only indication in the record regarding claimant's continued job search after that point was claimant's testimony that she began applying for jobs elsewhere in October of 2004. On October 10, 2004, claimant obtained part-time employment driving a school bus for Durham Bus Company, working 20 hours a week and earning $9.70 per hour without any fringe benefits.

I. Did the Division of Workers Compensation have jurisdiction to enter the December 18, 2003 settlement hearing?

This matter proceeded to regular hearing before the ALJ on February 11, 2005. The ALJ, after reviewing the record and listening to the arguments of counsel, determined that the settlement hearing, performed before the Special ALJ, was not proper. The ALJ, citing K.S.A. 44-534, determined that the failure by the parties to file an application for hearing before the settlement hearing resulted in the Kansas Workers Compensation Division being without jurisdiction to conduct the settlement hearing. K.S.A. 44-534(b) requires that an application for hearing be on file in the office of the Director within three years of the date of accident or two years of the date of the last payment of compensation, whichever is later. Claimant's acknowledged date of accident in this instance is August 12, 2002, with the E-1 being filed on January 29, 2004.

The Board disagrees with the ALJ's determination that the Kansas Workers Compensation Division did not have jurisdiction to enter the settlement agreement award.

> Where all parties agree to the payment of all or any part of compensation due under the workers compensation act or under any award or judgment, and where it has been determined at a hearing before the administrative law judge that it is for the best interest of the injured employee or the dependents of a deceased employee, or that it will avoid undue expense, litigation or hardship to any party or parties, the administrative law judge may permit the employer to redeem all or any part of the employer's liability under the workers compensation act by the payment of compensation in a lump sum, except that no agreement for payment of compensation in a lump sum shall be approved for nine months after an employee has returned to work in cases in which the employee, who would otherwise be entitled to compensation for work disability, is not entitled to work disability compensation because of being returned to work at a comparable wage by the

> employer who employed the worker at the time of the injury giving rise to the claim being settled.[6]

Jurisdiction, which is generally defined as authority to make inquiry and decision regarding a particular matter,[7] is generally discussed in the terms of two subcategories, which are subject matter and personal jurisdiction. "Subject matter jurisdiction" is the power to hear and decide a particular type of action.[8] Here, the Workers Compensation Division has subject matter jurisdiction over workers compensation matters. The second, "personal jurisdiction," can be established only when the action is in the proper court after appropriate service of process upon the individual or voluntary appearance by the individual.[9] In this instance, claimant and respondent appeared at the settlement hearing voluntarily and agreed to the proceedings. The Board, therefore, finds that the Workers Compensation Division did have jurisdiction over the parties and the subject matter.

In addition, the Board finds that the filing of the settlement hearing documents with the Division of Workers Compensation immediately after the settlement hearing satisfied any requirements that a formal claim or application for hearing be filed.

II. Is the settlement award subject to review and modification?

Respondent argues that the settlement hearing not only settled claimant's entitlement to permanent disability benefits based upon her functional impairment, but also eliminated claimant's entitlement to any additional permanent partial general work disability under K.S.A. 44-510e. This argument fails.

K.S.A. 44-555c establishes the Kansas Workers Compensation Board (Board), which is responsible for reviewing all activities of administrative law judges under the Workers Compensation Act. Appeals from administrative law judge orders to the Board require written requests of any interested party within ten days.[10] In this instance, there was no appeal of this settlement to the Board, and the Board, therefore, has no jurisdiction to review the propriety of the initial Award, except for purposes of review and modification.

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[6] K.S.A. 44-531(a).

[7] *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973).

[8] *State v. Matzke*, 236 Kan. 833, 696 P.2d 396 (1985).

[9] *Buehne v. Buehne*, 190 Kan. 666, 378 P.2d 159 (1963).

[10] K.S.A. 2004 Supp. 44-551(b)(1).

While an appeal from the settlement was never filed, it may be modified in this instance as the parties agreed at the time of settlement hearing that claimant's right to review and modification was not terminated by the settlement. Review and modification of an award may be for good cause shown upon application of the employee, the employer, dependent, insurance carrier or any other interested party.[11]

> The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.[12]

> (d) Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no extent shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.[13]

Special administrative law judges may be appointed by the Director in case of emergency. The special administrative law judges are then assigned to conduct examinations and hearings of designated cases.[14] After appointment, the special administrative law judges shall "exercise the same powers as provided by this section for the regular administrative law judges."[15] The special administrative law judges are entitled to conduct settlement hearings pursuant to K.S.A. 44-531, the same as administrative law judges. That statute requires that a determination be made that a settlement "is for the best interest of the injured employee or the dependents of a deceased employee, or that it will avoid undue expense, litigation or hardship to any party or parties . . . ."[16] The special administrative law judge is then permitted to allow the employee to receive all or part of the workers compensation benefits by payment in a lump sum.

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[11] K.S.A. 44-528(a).

[12] K.S.A. 44-528(a).

[13] K.S.A. 44-528(d).

[14] K.S.A. 2004 Supp. 44-551(d).

[15] K.S.A. 2004 Supp. 44-551(d).

[16] K.S.A. 44-531(a).

In this record, there is no indication that the Special ALJ addressed the best interests of claimant. The Special ALJ did not inquire as to claimant's work status and may have been unaware that claimant was not employed at the time of the settlement hearing. Although claimant was still eligible for the bid process, claimant's employment with respondent had terminated as of approximately March 13, 2003, when her light-duty benefits period ended. Had the Special ALJ been aware of claimant's work restrictions and job loss, it is doubtful the settlement, based on claimant's percent of impairment rather than a higher work disability, would have been approved.

Claimant was paid short-term disability for six months and had applied for long-term disability payments, which, as noted above, ultimately conflicted with her workers compensation settlement benefits. There was also no determination or even inquiry made by the Special ALJ regarding what, if any, benefits claimant was receiving or how her workers compensation settlement may affect those benefits. Additionally, respondent has contended during the litigation of this matter that claimant's settlement prohibits her from obtaining additional permanent partial general disability benefits under K.S.A. 44-510e. The Board acknowledges that the settlement hearing transcript contains contradictory statements about whether claimant was compromising the issues regarding the nature and extent of her impairment and the nature and extent of her disability. This would indicate that claimant waived her rights at the settlement hearing for not only any additional functional impairment, but also any permanent partial general work disability to which she would be entitled without any questioning of claimant to elicit her understanding of what she was giving up in exchange for the lump sum payment. Nonetheless, the right to review and modification was left open.

The lack of a proper inquiry by both respondent's attorney and the Special ALJ cause the Board concern. Reasonable inquiries into claimant's employment status and claimant's understanding about the effect of this award on claimant were not made. Representations from respondent's representatives to claimant regarding the effect of this settlement on her long-term disability benefits were inaccurate. This was an unrepresented claimant. Specific safeguards contained in the statutory procedures for settlements were ignored. As Justice Herd pointed out in his dissenting opinion in *Barncord*, "[t]he Director's role in workers' settlements is similar to the role of a district judge in settlements with minors, that of protecting the worker."[17]

The medical information attached to the settlement hearing supported a finding of a 10 percent functional impairment, but the compensation for such an award was incorrectly computed. Representations by respondent's attorney both at the time of the settlement hearing and in the litigation subsequent to that time contend that claimant's permanent partial general disability was also settled, even though claimant testified that

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[17] *Barncord v. Kansas Dept. of Transportation*, 228 Kan. 289, 613 P.2d 670 (1980).

no one, at any time, discussed work disability with her. In fact, claimant testified at the regular hearing that she was not even aware at that time what work disability was.[18] The Board finds that this settlement was inadequate and, pursuant to K.S.A. 44-528, will modify the award upon such terms as it deems just.

In the Award, the ALJ determined that the employer was equitably estopped from asserting the no good faith job search defense based upon representations made to claimant both by respondent and by respondent's attorney at the settlement hearing. The Board acknowledges that the doctrine of equitable estoppel can be applied in workers compensation litigation.[19] The Board, however, does not apply equitable estoppel to this circumstance. The Board acknowledges the activities of respondent's attorney and the Special ALJ were less than adequate at the settlement hearing, but considers the remedies set forth in K.S.A. 44-528 to be more appropriate with regard to this circumstance.

K.S.A. 44-510e defines permanent partial general disability as,

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.[20]

K.S.A. 44-510e defines "functional impairment" as,

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[21]

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[18] R.H. Trans. at 12.

[19] *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d 501, 6 P.3d 421, *rev. denied* 269 Kan. 933 (2000).

[20] K.S.A. 44-510e(a).

[21] K.S.A. 44-510e(a).

K.S.A. 44-510e goes on to state,

> An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.[22]

With regard to claimant's functional impairment, the ALJ, in considering the opinions of both Dr. Sankoorikal and Dr. Zimmerman, determined that claimant had a 10.5 percent impairment to the body as a whole on a functional basis. The Board in reviewing the evidence finds that the parties' original agreement at the settlement hearing, that claimant had suffered a 10 percent permanent partial impairment to the body as a whole on a functional basis, is appropriate. The parties have not shown a change in claimant's condition to justify the modification of claimant's functional impairment.[23] The Award of the ALJ in that regard is modified.

Likewise, in considering what, if any, task loss claimant may have suffered, the ALJ determined that the task loss opinions of Dr. Sankoorikal and Dr. Zimmerman, both based upon the task list prepared by Mr. Santner, were entitled to equal weight and determined claimant suffered a task loss of 59.5 percent for the injuries suffered on August 12, 2002.

The wage loss component of K.S.A. 44-510e must be read in light of both *Foulk*[24] and *Copeland.*[25] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In this instance, claimant was not specifically offered a job. Additionally, even though claimant had the opportunity to bid, the Board finds that there was uncertainty in the bid process, as it would not be determined if she had the appropriate seniority until after claimant had submitted the bid. Because respondent never made a specific job offer to claimant, the Board finds that claimant did not violate the policies set forth in *Foulk*.

In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to

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[22] K.S.A. 44-510e(a).

[23] K.S.A. 44-528.

[24] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[25] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[26]

With regard to *Copeland*, the Board must determine whether claimant put forth a good faith effort in her post-injury job search. Claimant acknowledges that for many months, she looked for no work away from respondent's employment, anticipating a return to a light-duty job with respondent within her abilities and restrictions. Claimant acknowledges she did not attempt to find work away from the employer until October of 2004, at which time she began looking for employment, finding work as a bus driver on October 10, 2004. Finally, claimant testified that she continues to look for work and is considering going back to school while working the part-time bus driving job, but has provided relatively little information regarding the extent of her job search. The Board cannot find that claimant has put forth a good faith effort in seeking employment after her injury and, therefore, must determine what, if any, wage should be imputed.

The Board recognizes that claimant missed an opportunity to bid upon a job with respondent that would have returned claimant to a comparable wage. But failing to bid on that job, standing alone, does not constitute a lack of good faith. The Board will, therefore, not impute to claimant the wage from that position. The Board will, instead, look to the opinion of vocational expert Dick Santner, who found that claimant had the ability to earn between $280 and $320 per week. In considering Mr. Santner's opinion, the Board finds claimant has the ability to earn $300 per week on a regular basis.

Pursuant to the stipulation of the parties, claimant's average weekly wage on the date of accident was $588.30. Effective September 13, 2003, claimant's fringe benefit package with respondent ceased and an additional $117.75 was added to the average weekly wage, making claimant's average weekly wage on September 13, 2003, $706.05.[27] Through September 12, 2003, claimant has suffered a wage loss of 49 percent when comparing an imputed post-injury wage of $300 to claimant's average weekly wage of $588.30. Effective September 13, 2003, the imputed average weekly wage of $300, when compared to the modified average weekly wage of $706.05, results in a wage loss of 58 percent.

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[26] *Id*. at 320.

[27] The ALJ, in adding the above wages, determined claimant's average weekly wage to be $706.06. The Board finds the mathematics of the ALJ to be off by $.01 and will adjust the award accordingly.

In averaging claimant's task loss of 59.5 percent and her wage loss of 49 percent, for the period through September 12, 2003, claimant has suffered a 54.25 percent permanent partial general disability. As of September 13, 2003, averaging claimant's task loss of 59.5 percent and her wage loss of 58 percent, claimant has suffered a 58.75 percent permanent partial general disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated June 6, 2005, should be, and is hereby, modified, and claimant is awarded benefits for injuries suffered on August 12, 2002, while employed with respondent.

Clamant is entitled to 11.29 weeks of temporary total disability compensation at the rate of $392.22 per week totaling $4,428.16, followed by 19.0 weeks of permanent partial general disability compensation at the rate of $392.22 per week totaling $7,452.18 through March 12, 2003, for an 10 percent permanent partial general disability, followed by 26.29 weeks of permanent partial general disability compensation at the rate of $392.22 per week totaling $10,311.46 from March 13, 2003, through September 12, 2003, for a 54.25 percent permanent partial general disability. Thereinafter, beginning September 13, 2003, claimant is entitled to permanent partial general disability compensation at the maximum statutory rate of $432 per week for a 58.75 percent permanent partial general disability, making a total award not to exceed $100,000.

As of October 11, 2005, there is due and owing claimant 11.29 weeks of temporary total disability compensation at the rate of $392.22 per week totaling $4,428.16, followed by 45.29 weeks of permanent partial general disability compensation at the rate of $392.22 per week totaling $17,763.64, plus 108.57 weeks of permanent partial general disability compensation at the maximum statutory rate of $432 per week totaling $46,902.24, for a total due and owing of $69,094.04, which is ordered paid in one lump sum minus any amounts previously paid. Thereafter, the remaining balance of $30,905.96 is to be paid at the rate of $432 per week, for a total award not to exceed $100,000, until fully paid or further order of the Director.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of December, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I would affirm the Administrative Law Judge's finding that the Special Administrative Law Judge lacked jurisdiction to hear the proposed settlement and to enter an order approving an award based upon that agreement without an application for hearing having been filed with the Division of Workers Compensation. K.S.A. 44-534 provides that the filing of an application for hearing is a prerequisite to maintaining a proceeding for compensation and the assignment of the matter to an administrative law judge. A settlement and redemption of liability under K.S.A. 44-531 requires an evidentiary hearing before the administrative law judge whereby the administrative law judge can determine that the prerequisites to such settlement have been met, including that it is in the best interest of the claimant. The exceptions to this requirement are for settlements that are not required to be presented to an administrative law judge for approval.[28] In addition, the Kansas Workers Compensation Act requires every pleading, motion and other paper provided for by the Workers Compensation Act to be signed by at least one attorney of record and to be signed by any party who is not represented by an attorney.[29] This was not done at the time of the settlement hearing, nor was that omission brought to the attention of the parties. I otherwise concur with the findings, conclusions and result reached by the majority.

BOARD MEMBER

[28] *See* K.S.A. 44-521, K.S.A. 44-527 and K.A.R. 51-3-1; *Barncord, supra*.

[29] K.S.A. 44-536a(a).

CONCURRING/DISSENTING OPINION

The undersigned respectfully dissents from the order of the majority in the above matter regarding the appropriate post-injury wage to be imputed in this instance, but agrees with the Board's Order in all other respects. The majority determined that claimant failed to put forth a good faith effort in her employment search after leaving her employment with respondent. The undersigned agrees with that finding. However, the majority, in determining what if any post-injury wage should be imputed to claimant, rejected the argument that claimant should be imputed the same wage that she would have received had she bid on the QCT job on respondent's first shift. Claimant, during her post-injury job search, had nothing to do for a several-month period except to check the bid board at respondent's plant. It is obvious claimant's efforts in this regard were less than adequate. A trip to the plant once a week would be a very small price to pay for the opportunity to return to employment at a comparable wage. Why claimant failed to do so is unknown. However, it is clear from the testimony of Mr. Sheern that had claimant bid on that job, her seniority would have been sufficient for her to be awarded the position. This Board Member, in considering the policies set forth in *Copeland*, would impute to claimant the wage she would have earned on the QCT job. As that would have paid wages in excess of 90 percent of her post-injury average weekly wage, claimant would have been limited, pursuant to K.S.A. 44-510e, to her functional impairment of 10 percent to the body as a whole.

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
James C. Wright, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Jerry R. Shelor, Special Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director